IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 907

MARRIOTT FOOD SERVICES, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.....

MARBRO FOOD SERVICE, INC., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Marbro Food Service, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on September 15, 1966.

Citation To Opinion Below

The opinion of the Court of Appeals is reported at 366 F. 2nd 477, and is printed in Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals was entered on September 15, 1966 (R.3)[1], and a decree of enforcement was issued by that Court on October 25, 1966 (R.4). An order staying enforcement of the decree for a period of thirty days was entered on October 25, 1966 (R.5), and an order extending such stay of enforcement to December 24, 1966, was entered by the Court of Appeals on November 22, 1966 (R.5). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Statutes Involved

Constitution of the United States, Article I, Section 8 and Amendment X.

The National Labor Relations Act, Sections 1 et seq., as amended, 2(6,7), 10(a), 29 U.S.C. Sections 151 et seq., 152(6,7), 160(a).

Questions Presented

1. Does the individual citizen have a constitutional right to protection from the imposition of federal police authority[2] upon him unless jurisdiction is established by

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[1]References are indicated as: "APP" — Appendix, this Petition; "R" — Transcript of Record Circuit Court of Appeals; "T" — Transcript of Record as filed in Court of Appeals for the Tenth Circuit.

[2]The term "federal police authority" is used in this Petition to refer to the power exercised by the federal government in establishing federal crimes and penalties for their violations, investigating alleged violations, prosecuting violators and imposing penalties; which power, we believe, is similar in all respects, and particularly in its impact on the citizens' liberties and freedom, to the "police power" exercised by the state governments.

the evidence in a proceeding against him, where he has an opportunity to defend against the government's assertion of jurisdiction?

2. Is this Court's decision in *National Labor Relations Board v. Reliance Fuel Oil Corporation*, 371 U.S. 224 (1963) properly interpreted as a ruling that the jurisdiction of the National Labor Relations Board need not be established in an individual case; and as precedent for the Board's right to assert jurisdiction, based only on a presumption of affect on commerce, where the only direct evidence shows that no actual affect on commerce is involved?

Statement Of The Case

The Petitioner, Marbro Food Service, Inc., is a Colorado corporation doing business entirely within the State of Colorado, which manufactures sandwiches and certain bakery products at its plant in Denver, Colorado. It sells these products to various refreshment stands and vendors in the Denver metropolitan area. None of its products are shipped outside the State of Colorado either by Petitioner or by any of its customers. The Petitioner purchases no products or supplies outside the State of Colorado.

The National Labor Relations Board first asserted jurisdiction over Petitioner by conducting a representation hearing, and, on March 30, 1964, ordering an election be conducted for the Petitioner's employees. In the representation proceedings the Petitioner protested the Board's assumption of jurisdiction on the grounds that it was not

engaged in commerce and that its operations did not affect commerce. This contention was rejected. (T. 183-185)

While the representation proceedings were pending, unfair labor practice charges were filed against the Petitioner by a labor union on March 10, 1964. (T. 177-178) Two amended charges were filed by the same union on March 13, and April 7, 1964. (T. 179-182) On April 30, 1964, the date on which the representation election was scheduled, the Board's Regional Director approved withdrawal of the charges previously filed by the union. (T. 182) The election was conducted and the union failed to obtain majority recognition.

On May 4, 1964, the union again filed with the Board a charge that the Petitioner had engaged in unfair labor practices, incorporating the identical allegations contained in the three charges previously filed and withdrawn. (T. 164-165) On June 3, 1964, the union filed an amended charge. (T. 166-167) A Complaint was filed against the Petitioner by the Regional Director on June 26, 1964. (T. 167-172)

The Petitioner filed its answer, specifically challenging the Board's jurisdiction and denying that it was an employer engaged in commerce and denying that any labor dispute such as was alleged in the Complaint would affect commerce. (T. 172-174) A hearing on the Complaint was held before a trial examiner of the National Labor Relations Board on August 18, 1964, at which the Petitioner reiterated its contention that the Board lacked jurisdiction. (T. 45)

The trial examiner found that the Board did have

jurisdiction over the Petitioner and that the Petitioner had been guilty of unfair labor practices in violation of the Act. (T. 4-41) The Petitioner filed with the Board objections to the trial examiner's "Findings and Recommended Order" and requested that the Complaint against it be dismissed. On May 25, 1965, the Board issued its "Decision and Order", adopting the trial examiner's findings with respect to jurisdiction and violation of the statute. (T. 43-44)

The Board then filed with the Court of Appeals for the Tenth Circuit a "Petition for Enforcement" of its order, which petition was filed on January 7, 1966. (T. 1-2) The Petitioner answered the petition on January 12, 1966, relying principally upon the jurisdictional question. (T. 2-3) The Court below ordered enforcement of the Board's order. (R. 3)

Throughout these proceedings the Board predicated its jurisdiction upon application of the Board's jurisdictional standards to admitted facts that the Petitioner, in one year, sold products valued at more than $50,000 to Automatic Catering, Inc., all such sales being made in Colorado; and that Automatic Catering had gross annual receipts during such year of over $500,000 and purchased from outside of Colorado products valued in excess of $50,000.

The only direct evidence before the Board bearing upon the question of affect upon commerce was the testimony of an officer of the Petitioner that an interruption in the Petitioner's business would have no affect upon the operations of Automatic Catering, and that the latter

company could obtain the same supplies which it was obtaining from Petitioner from other sources immediately. (T. 112-113) No evidence to show that an interruption of the Petitioner's business would affect commerce was produced by counsel for the Board, either directly or through cross-examination.

The Court below accepted the proof of facts bringing "the proceedings within the self-imposed jurisdictional standards of the Board" as establishing jurisdiction, disregarding the direct evidence showing that the Petitioner's business did not affect commerce, and rejected the Petitioner's contentions that the Board's jurisdiction must be established in each particular case by a showing that the required impact on interstate commerce was proved. (R. 3; App. 16)

Reasons For Granting The Writ

1. The judgment of the court below is grounded upon a far-reaching misconstruction and overextension of this Court's per curiam decision in *National Labor Relations Board v. Reliance Fuel Oil Corporation,* 371 U.S. 224 (1963).

Since the *Reliance* decision represents the most recent statement of this Court with respect to the use of the jurisdictional standards of the National Labor Relations Board in establishing its jurisdiction, the true meaning and scope of the decision is of great significance. Several courts of appeal have cited the language used by this Court in *Reliance* that "Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause"

(emphasis in original), in a manner to indicate over-emphasis on the word "jurisdictional" to the apparent exclusion of the phrase "constitutionally permissible".[3] While each of these circuit court decisions involved factual situations where there was some direct or indirect interstate flow of materials or services to or from the employer over which the Board exerted its jurisdiction, which is not the situation in the present case, they do indicate that the *Reliance* decision is apparently accepted by these lower courts as granting blanket authority to the N.L.R.B. to utilize its jurisdictional standards as proof of the necessary jurisdictional facts, to the exclusion of other evidence before the court.

The Court of Appeals for the Fourth Circuit, in *National Labor Relations Board v. Cross,* 346 F.2d 165 (1965), interpreted *Reliance* as rejecting the proposition that the Board's jurisdiction must be determined on the basis of substantial evidence in each case. In that case there was evidence of substantial sales by the respondent to two other companies which were engaged in interstate commerce, and the court held that proof of such sales, meeting the Board's jurisdictional standards, constituted proof of affect upon commerce. Certiorari was denied by this Court, 382 U.S. 918.

Our case is different from *Cross* in one very significant respect. Here, there was testimony in the record to directly show that interruption of the Petitioner's business operations would not affect the activities of its customer, which was engaged in interstate commerce according to the Board's standards. Although proof of facts bringing a

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[3] N.L.R.B. v. Citizens Hotel Company, 313 F.2d 708 (5th Cir. 1963); Kingsbury Electric Cooperative, Inc. v. N.L.R.B., 319 F.2d 387 (8th Cir. 1963); N.L.R.B. v. Inglewood Park Cemetery Association, 355 F. 2nd 448 (9th Cir. 1966) cert. den. 384 U.S. 951; and N.L.R.B. v. National Survey Service, Inc., 361 F.2d 199 (7th Cir. 1966.

case within the jurisdictional standards set up by the Board may be accepted, in the absence of other evidence, as establishing the Board's jurisdiction, is an individual employer denied the opportunity to present evidence to show that, in his individual situation, an interruption of his activities would not affect commerce?

In the present case there is no evidence in the record to show that the Petitioner received any goods whatever from outside the State of Colorado or to show that any of the Petitioner's products moved outside the State of Colorado, either directly or indirectly. The Petitioner only furnished some goods to Automatic Catering, which also shipped no goods in interstate commerce. Automatic Catering did receive some materials from outside Colorado; however, there was no showing of any connection between the goods furnished by the Petitioner to Automatic Catering and the goods received by the latter from out of state. There was direct evidence to show that an interruption of the Petitioner's business would have no affect at all upon the operation of Automatic Catering. (T.112-113) No evidence was presented, either directly or through cross-examination, to refute this showing.

Shortly after adoption of the original National Labor Relations Act, this Court ruled in *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937), that the question whether or not particular action does affect commerce in such a fashion as to be subject to federal control, and hence within the jurisdiction of the Board, is left to be determined as individual cases arise. This fundamental constitutional principle has been reiterated by this Court on several subsequent occasions,[4] and even in *Polish National Alliance of the United States of North*

[4] e.g., Consolidated Edison Company v. N.L.R.B., 305 U.S. 197 (1938).

America v. N.L.R.B., 322 U.S. 643 (1944), from which the Court quoted in *Reliance*, the Court also said that:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. On the other hand, the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions."

And, in a concurring opinion in the same case it was said, ". . . whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of federal power must clearly appear."

To interpret *Reliance* as overruling these previous decisions and as holding that the required impact on interstate commerce need not be established by the evidence in an individual case, as the Tenth Circuit did, is violative of basic constitutional principles. Such interpretation, in effect, grants a federal administrative agency unlimited power and jurisdiction in contradiction of the specific limitations placed by the Constitution on the national government. Such interpretation denies an individual citizen any opportunity to overcome the presumptive effect of the Board's jurisdictional standards, by direct evidence. If

this Court did not intend to eliminate the need for a federal jurisdictional determination, and did not intend to deny the personal right to show absence of Board jurisdiction, a review of the judgment below and clarification of the *Reliance* opinion is clearly necessary.

2. This request for review presents a basic question of individual rights under the Constitution of the United States, not only of the Petitioner but also of literally thousands of other similarly situated employers. That right is the right of a citizen to be secure against the exercise of federal police authority except in those limited situations where the Constitution grants authority for the federal government to act. If an administrative agency of the federal government can impose its jurisdiction upon a citizen by reason of so-called jurisdictional standards, developed by the agency and subject to change from time to time, and if such standards are accepted by the courts as conclusive evidence of jurisdiction so that the citizen is denied an opportunity to show that his activities are not within the scope of the federal government's authority, there is no protection for the citizen and the police authority of the national government is unlimited. The decision of the court below does effectively deny this Petitioner the right to present evidence of his individual situation and to have that evidence considered in determining the jurisdictional question. The precedent established may well have a far-reaching future effect upon many other small businessmen.

Certainly, the constitutional rights of a businessman-citizen are no less dear and no less deserving of protection by this Court than are the similar rights of members of minority groups and individuals who are subjects of state police investigations. In all cases, ultimate relief from un-

constitutional exercise of police power, whether state of federal, must be found in this Court.

3. The Tenth Circuit also held that the Petitioner's argument that commerce was not affected because Automatic Catering had an alternative source of supply was not material. The Court below based this conclusion upon this Court's decision in *National Labor Relations Board v. Bradford Dyeing Association,* 310 U.S. 318, 326 (1940), stating that "a similar contention was rejected by the Supreme Court" in that case.

Again, we feel that the Court of Appeals has misinterpreted and misapplied the earlier ruling of this Court. In the *Bradford Dyeing Association* case the employer was operating a processing plant which received and shipped goods in interstate commerce. It was argued there that the customers utilizing the services of the processing plant could obtain the same services elsewhere in the event of an interruption in operations of the plant, and that therefore a labor dispute which stopped the interstate flow of materials to and from the respondent's plant would not affect commerce. This court held that the existence of such alternative sources for the same service was not material "where the materials processed are moved to and from the processor by their owners through the channels of interstate commerce." We would have no quarrel with the principle expressed and applied to the factual situation existing in that case.

However, the factual situation in the present case is entirely different. Here, no goods were moving to or from the Petitioner in interstate commerce. The Petitioner was selling some of its products to Automatic Catering, which distributed such items solely within the State of Colorado. Automatic Catering obtained other items from outside

Colorado and the Board presumed that its activities would affect interstate commerce because of such receipts. Any affect upon interstate commerce must, therefore, logically be based upon some showing that interruption of Automatic Catering's business and its use of goods received in interstate commerce would result from its failure to receive particular items from the Petitioner.

The uncontradicted evidence before the Board showed that no such interruption of Automatic Catering's activities would occur if there were a work stoppage at the Petitioner's plant. It was shown that several alternative sources of supply existed and that Automatic Catering could obtain the same items "immediately" from such other sources. To extend this Court's *Bradford Dyeing Association* principle to this factual situation violates logic and fallaciously ignores the clear facts showing no resulting affect upon commerce.

4. The decision of the court below is believed to be erroneous for several reasons. In the first place, we feel that it misinterprets and misconstrues this Court's decision in *Reliance* as rejecting a long established rule that jurisdiction must be established in each case, whether the attempt to exert authority is by the National Labor Relations Board or any other agency of the federal government. Secondly, we respectfully submit that such interpretation is violative of fundamental constitutional principles; because, for all practical purposes, it permits an agency of the federal government to determine its own scope of authority without regard for the constitutional limitations upon the police authority of the federal government. Moreover, it establishes the jurisdictional standards of the National Labor Relations Board, which at best can only be presumptions of an affect upon interstate com-

merce, as conclusive evidence of such affect. Further, the court below made no effort to view the evidence on the record as a whole, completely disregarded direct evidence in the record showing that the Petitioner's activities had no affect upon commerce, and based its determination of Board jurisdiction solely upon the general jurisdictional standards of that agency, without regard to the appropriateness of their application to the facts of this case as disclosed by the record.

Conclusion

This request for review involves an important constitutional question of jurisdiction. Lower federal courts, by quoting out-of-context from opinions of this Court without regard to varying factual situations, have constantly expanded the authority of the N.L.R.B. to limits which defy practical justification. The court below has taken the final step in awarding this federal administrative agency arbitrary authority, free from any restriction under the commerce clause and from the necessity of meeting proof that an employer's activities have no affect on commerce.

The question presented is deserving of current review by this Court, so that the rights of individual employers may be reaffirmed and the constitutional bounds of the federal government's legal power clearly marked. A writ of certiorari should be issued.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8572 — July Term, 1966

National Labor Relations Board, Petitioner

v.

Marbbo Food Service, Inc., d/b/a Fab's Famous Foods Company, Respondent

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On Petition for Enforcement of an Order of the National Labor Relations Board

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Filed Sept. 15, 1966, Robert B. Cartwright, Clerk.

Thomas Canafax, Attorney, National Labor Relations Board, Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and George B. Driesen, Attorney, National Labor Relations Board, were with him on the brief) for Petitioner.

Russell P. Kramer (Richard L. Harring was with him on the brief) for Respondent.

Before Murrah, Chief Judge, and Breitenstein and Seth, Circuit Judges.

Breitenstein, Circuit Judge.

Pursuant to § 10(e) of the National Labor Relations Act[1] the Board petitions for the enforcement of its order[2] entered upon findings that Marbro had violated § 8(a)(1) and (3)[3] of the Act by engaging in unfair labor practices. Marbro defends on the ground that the Board does not have jurisdiction.

Marbro makes sandwiches and pastries which it sells at wholesale to vending machine operators and other retail outlets. In the pertinent year it sold products valued at more than $50,000 to Automatic Catering, Inc. All such sales were made in Colorado. Automatic Catering has annual gross retail receipts of over $500,000 and purchases annually from outside of Colorado products valued in execss of $50,000. These facts bring the proceedings within the self-imposed jurisdictional standards of the Board.[4]

Section 10(a) of the Act authorizes the Board to prevent any person from engaging in any unfair labor practice affecting commerce.[5] Marbro argues that the jurisdictional determination must be made on a case by case basis and that the required impact on interstate commerce must be established in each particular case. This approach to Board jurisdiction was rejected by the Supreme Court

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[1]29 U.S.C. § 160(e).

[2]Reported at 152 NLRB 826.

[3]29 U.S.C. § 158(a)(1) and (3).

[4]See Siemons Mailing Service, 122 NLRB 81, 85; Carolina Supplies and Cement Co., 122 NLRB 88, 89; and Taylor Baking Co., 143 NLRB 566.

[5]Section 2(7) of the Act, 29 U.S.C. § 152(7), defines "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Section 2(6) of the Act, 29 U.S.C. § 152(6), says that "commerce" is "trade, traffic, commerce, transportation, or communication among the several States * * *."

in National Labor Relations Board v. Reliance Fuel Oil Corp., 371 U.S. 224, which reversed a Second Circuit decision based on the principles which Marbro here asserts. After commenting in Reliance that Congress vested in the Board "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," the Court said that effects on interstate commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board."[6] The Court reaffirmed the statement made in Polish Alliance v. National Labor Relations Board, 322 U.S. 643, 648, that Congress has regulated "activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce."

The Board has acted within the ambit of its constitutional and statutory power, and it is not for the courts to say that such power should not have been exercised.[7] Marbro met the Board's indirect outflow standard by furnishing goods valued at more than $50,000 to Automatic Catering which was within the direct jurisdictional standard because it purchased over $50,000 in goods from outside Colorado and earned over $500,000 in gross retail receipts. Large sales to buyers engaged in interstate commerce are within the constitutional reach of Congress.[8] The argument of Marbro that commerce is not affected because Automatic Catering had an alternative source of

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[6] 371 U.S. 224, 226.

[7] National Labor Relations Board v. Townsend, 9 Cir., 185 F.2d 378, 383, certiorari denied 341 U.S. 909. See also National Labor Relations Board v. F. M. Reeves and Sons, Inc., 10 Cir., 273 F.2d 710, 712, certiorari denied 366 U.S. 914.

[8] National Labor Relations Board v. Cross, 4 Cir., 346 F.2d 165, 167, certiorari denied 382 U.S. 918.

supply is not material. A similar contention was rejected by the Supreme Court in National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U.S. 318, 326. We conclude that the Board had jurisdiction.

We have examined the record and find that substantial evidence sustains the Board's decision that Marbro had engaged in unfair labor practices violating § 8(a)(1) and (3) of the Act.

The order of the Board will be enforced.